

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

---oOo---

CERTIFIED ORIGINAL

JG Jane GROSSMAN
RS REPORTING Services

AT&T CORPORATION,)
)
Plaintiff,)
)
vs.)
)
DATAWAY INC. and dba DATAWAY)
DESIGNS,)
)
Defendants.)

No. C07-02440-EDL

DATAWAY, INC.,)
)
Counterclaimant,)
)
vs.)
)
AT&T CORPORATION,)
)
Counterdefendant.)

DEPOSITION OF FRANCISCO J. MOLIERI

April 15, 2008

VOLUME I - Pages 1 through 64

Taken before JANE GROSSMAN, CSR No. 5225

JANE GROSSMAN REPORTING SERVICES
Certified Shorthand Reporters
1939 Harrison Street, Suite 460
Oakland, California 94612
(510) 444-4500

DEPOSITION OF FRANCISCO J. MOLIERI - VOLUME I

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

DEPOSITION OF FRANCISCO J. MOLIERI

TUESDAY, APRIL 15, 2008

VOLUME I

PAGE

EXAMINATION BY: MR. AIRES

4

E X H I B I T S

DEPOSITION EXHIBIT NUMBER

PAGE

1 Multipage document entitled "RESPONSE TO
PLAINTIFF'S AND COUNTERDEFENDANT'S FIRST
SET OF SPECIAL INTERROGATORIES PROPOUNDED
TO DEFENDANT AND COUNTERCLAIMANT DATAWAY
(No Bates numbers)

36

---oOo---

QUESTION NOT ANSWERED

PER INSTRUCTION OF COUNSEL

PAGE LINE

27 10

---oOo---

Proceedings Scheduled: 11:00 a.m.

Proceedings Commenced: 12:02 p.m.

RECESSES

12:45 p.m. until 12:49 p.m.

Proceedings Adjourned: 1:25 p.m.

---oOo---

DEPOSITION OF FRANCISCO J. MOLIERIVOLUME I

BE IT REMEMBERED that, pursuant to Notice of Taking Deposition and on Tuesday, April 15, 2008, commencing at the hour of 12:02 p.m., at the Law Offices of KORNFIELD, PAUL, NYBERG & KUHNER, Lake Merritt Plaza, 1999 Harrison Street, Suite 2675, Oakland, California 94612, before me, JANE GROSSMAN, a Certified Shorthand Reporter of the State of California, personally appeared FRANCISCO J. MOLIERI, produced as a witness in said action, and being by me first duly sworn, was thereupon examined as a witness in said cause.

---oOo---

A P P E A R A N C E S

TIMOTHY CARL AIRES, Attorney at Law, of the AIRES LAW FIRM, 180 Newport Center Drive, Suite 260, Newport Beach, California 92660, was present on behalf of Plaintiff and Counterdefendant AT&T Corporation.

ANNE-LEITH MATLOCK, Attorney at Law, of the MATLOCK LAW GROUP, PC, 1485 Treat Boulevard, Suite 200, Walnut Creek, California 94597, was present on behalf of Defendant and Counterclaimant Dataway, Inc. and dba Dataway Designs.

---oOo---

1 TUESDAY, APRIL 15, 2008 12:02 P.M.

2 FRANCISCO J. MOLIERI,

3 having been sworn as a witness by the
4 Certified Shorthand Reporter,
5 testified as follows.

6 ---oOo---

7 EXAMINATION BY MR. AIRES

8 MR. AIRES: Q. Could you please state and
9 spell your name for the record?

10 A. Francisco, F-r-a-n-c-i-s-c-o, middle initial
11 J., Molieri, M-o-l-i-e-r-i.

12 Q. Are you currently employed?

13 A. Yes.

14 Q. By whom?

15 A. Dataway, Incorporated.

16 Q. How long have you been so employed?

17 A. Since September 2000.

18 Q. All right. And what position do you currently
19 hold?

20 A. Controller.

21 Q. And how long have you held that position?

22 A. Since September 2000.

23 Q. All right. What are your duties and
24 responsibilities as the controller?

25 A. Oversee the day-to-day operations and the

1 early morning, and the following weekend.

2 Q. Do you know what long-distance provider was
3 used?

4 A. It was done through the same way as the calls
5 from January 24th, except the calls that followed showed
6 up on our regular contracted accounts with SBC/AT&T.

7 Q. And they were billed for other long-distance
8 carriers?

9 A. Yes. They were MCI, Sprint, and there were
10 some -- a few other ones with small charges. I do not
11 recall their names, but...

12 Q. But they were long-distance service providers?

13 A. Yes. I believe they are the kind that does
14 the 10-10-something to dial. I believe that's the kind
15 of service they provide.

16 I know one of them was located in Miami.

17 Q. All right. So, there were charges that showed
18 up on an AT&T invoice; is that right?

19 A. Yes.

20 Q. And those were in the sum of \$11,534.67?

21 A. Yes.

22 Q. All right. So, that came as one invoice from
23 AT&T; right?

24 A. Yes.

25 Q. And then you received a different invoice from

1 your local telephone service provider?

2 A. From AT&T as well.

3 Q. Or SBC?

4 A. We have two system accounts.

5 One is a contracted long-distance account,
6 where we have a reduced rate for long-distance calls.

7 The other one is what is called our "Summary
8 Billing Account." That comprises our contracts with
9 AT&T local, toll, and long distance.

10 The \$11,000 you mentioned came on an account
11 that we had never set up.

12 The other charges, the MCI and Sprint charges,
13 came on the summary billing.

14 And there were several smaller charges on the
15 long distance.

16 Q. On the summary -- on the bill that you would
17 have normally expected to see?

18 A. Yes.

19 Q. Okay. And you concluded somehow that at least
20 some of these charges were the result of caller --
21 calling code access?

22 Do you know what that term means?

23 A. I'm not sure if I understand it exactly.

24 Q. All right. You made reference to 10-10-280.

25 A. Uh-huh.

1 Q. Have you ever seen any of those ads where they
2 sold -- they sold access to phone users by dialing a
3 10-10 code?

4 A. Yes.

5 Q. So, do you remember that -- I think it was
6 either Sprint or MCI had 10-10-280?

7 A. I know I've seen the ads. I don't remember
8 which one had what.

9 Q. Do you remember the ad from AT&T which was
10 10-10-ATandT?

11 A. No.

12 Q. Do you know how is \$11,534.67 charges were
13 generated?

14 A. Not exactly. I don't know which method they
15 used. I did some research and found that the call had
16 been originated not in California, but in Kansas, and,
17 you know, it had gone to a number in the Philippines.
18 But I don't know which mechanism.

19 Q. So, you're not aware that it was accessed
20 through using the calling access code 10-10-288?

21 A. I don't have firsthand knowledge.

22 Q. Did anybody ever tell you that?

23 A. Not that I recall.

24 Q. How did you learn that the other charges
25 from the other long-distance service providers were the

1 result of calling access codes?

2 A. At some point in the discussions with the
3 local AT&T managers that was revealed to me.

4 Q. So, somebody at AT&T told you that the
5 charges from Sprint and MCI were the result of calls
6 made through the use of calling-code-access numbers?

7 A. I believe so.

8 Q. Did they ever -- did those -- did that person
9 at AT&T ever indicate to you that the AT&T charges that
10 amounted to \$11,534.67 were the result of calls made
11 using a calling-code-access number?

12 A. No.

13 Q. Back in 2006, did you conclude that the
14 methodology of the making of the calls relative to the
15 AT&T charges totaling about \$11,000 was different from
16 the MCI and the Sprint charges?

17 A. In all honesty, I cannot tell the difference
18 when I looked at the bills.

19 When I received the bill for the \$11,000, I
20 knew it was not one of our accounts.

21 And following the instructions we had been
22 given to dispute these charges, when I called to dispute
23 it, I called the AT&T Billing Office to place the
24 billing dispute.

25 I asked at the time -- because it wasn't in my

1 radar, I asked at the time who had set up the account.
2 I wanted to know if either one of the two owners of the
3 company had set up this other account with AT&T. And I
4 was never given an answer.

5 I repeatedly asked several people if I could
6 have a copy of the contract we had signed for my
7 records, so I would have some verification that this
8 bill, in fact, belonged to us, and it was not due to
9 some error. I was never given any answer.

10 Q. Okay. Did you ever communicate with anybody
11 at Sprint regarding the toll charges that they assessed?

12 A. No.

13 Q. How about MCI?

14 A. No.

15 What the local AT&T manager told me to do was
16 to send letters to each one of those carriers asking them
17 to reverse the charges because they were calls by --
18 fraudulent calls.

19 I researched each one of the companies listed
20 on the bills, found their addresses, sent letters.

21 I sent copies of all of those letters to the
22 local AT&T manager.

23 And some of them called me back -- not MCI or
24 Sprint, who were the two largest ones, but the other
25 ones. That's how I know one of them was from Miami. And

1 apologize for it -- is I might speak when you are
2 speaking. I don't mean to do that. I apologize.

3 At any point in time was your local telephone
4 service terminated?

5 A. No.

6 Q. All right. At any point in time was any
7 telephone service -- strike that.

8 At any point in time was any long-distance
9 telephone service provided by AT&T terminated as the
10 result of your failure to pay a bill?

11 A. No.

12 Q. Who is your local provider now?

13 A. AT&T.

14 Q. All right. And do they provide both local
15 telephone service as well as your long-distance
16 telephone service?

17 A. Yes, they do.

18 Q. So, is it fair to state that as a result of
19 this dispute involving toll charges that you have not
20 suffered any telephone interruption?

21 A. No, we have not.

22 Q. Now, as I understand it, this dispute has been
23 kind of time-consuming for you folks; is that correct?

24 A. That's right.

25 Q. And you've allocated a certain amount of your

1 time to try to resolve this?

2 A. Yes.

3 Q. And I believe there's a suggestion that you've
4 allocated 144 hours to this process.

5 A. Yes, that's correct.

6 Q. Do you keep time sheets?

7 A. No, I don't.

8 Q. How did you -- how did you sum the 144 --
9 strike that.

10 Upon what information did you rely upon in
11 coming to the conclusion that you had allocated 144 hours
12 to the process of trying to resolve this dispute with
13 AT&T?

14 A. I came to that conclusion based on --
15 MS. MATLOCK: Actually, objection.

16 As you know from your documents that you're
17 looking at, we have actually produced a privilege log
18 that work product and attorney-client privilege pertains
19 here, which is the one item -- that and privacy -- that
20 I can tell my client not to respond.

21 These things were prepared and looked at and
22 figured into in preparation for litigation.

23 So, my client does not need to answer.

24 MR. AIRES: Okay. So, the objection is
25 attorney work product, attorney-client privilege, and

1 privacy?

2 MS. MATLOCK: Uh-huh.

3 MR. AIRES: And you're instructing him not to
4 answer?

5 MS. MATLOCK: I am.

6 MR. AIRES: All right. So, if I ask him any
7 questions about how he determined that it was 144 hours,
8 you are going to give him that instruction?

9 MS. MATLOCK: It depends on how you verb --
10 verbiage the question.

11 MR. AIRES: Q. Do you keep a diary, a daily
12 journal?

13 A. For work?

14 Q. Yes, for work.

15 A. No.

16 Q. Do you have a desktop calendar or anything?

17 A. Yes, I do, but I don't -- I don't use it as
18 much.

19 Q. Okay. So, it's not like you make little
20 notations on your desktop calendar indicating what you
21 did from eight o'clock in the morning until 8:30 in the
22 morning, assuming that you were at work at eight o'clock
23 in the morning until 8:30 in the morning?

24 A. No.

25 Q. And you are not required to maintain records

1 of how you spend your time at work, are you?

2 A. No, I'm not required.

3 Q. So, you don't do it voluntarily, and you are
4 not mandated to do it; is that right?

5 A. That's correct.

6 Q. Is anybody at your company required -- strike
7 that.

8 Was the same true for back in 2006?

9 A. Yes.

10 Q. How about in 2007?

11 A. Yes.

12 Q. All right.

13 MS. MATLOCK: Ambiguous.

14 Are you asking for him -- for his time in 2006
15 and in 2007?

16 MR. AIRES: Q. Is that the way you understood
17 my question?

18 A. I understood you were asking me personally if
19 I --

20 Q. Yes. And that's how I intended it.

21 To your knowledge -- strike that.

22 To your knowledge, back in 2006, was anybody at
23 Dataway required to account for their time spent on
24 projects?

25 A. Yes. The engineers.

1 Q. All right. Did the engineers spend any time
2 back in 2006 trying to resolve this dispute with AT&T?

3 A. No.

4 Q. Other than yourself, who in 2006 spent any
5 time trying to resolve this dispute with AT&T?

6 A. Simon Lewis.

7 Q. Anybody else?

8 A. No.

9 Q. To your knowledge, was Mr. Lewis keeping track
10 of his time in written form?

11 A. To my knowledge, no.

12 Q. All right. So, you've not seen a daily log
13 that he has prepared or a time sheet or anything on a
14 day-to-day basis saying what he did on any particular
15 day and between any particular hours?

16 A. No.

17 Q. Has anybody ever told you that such a
18 contemporaneous written document exists?

19 A. (No response.)

20 Q. Withdrawn.

21 Has anybody ever told you that Mr. Lewis kept a
22 log?

23 A. No.

24 Q. What's Mr. -- strike that.

25 In 2006, what was Mr. Lewis's job title?

1 A. President and CEO of the company.

2 Q. Do you have an understanding as to what his
3 duties and responsibilities were?

4 A. Yes.

5 Q. Back in '06?

6 A. Yes.

7 Q. What were they, as you understood it?

8 A. He manages the financial and business side of
9 the operation.

10 Q. In 2007 were his duties the same?

11 A. Yes.

12 Q. How about right up until today, in 2008? Is
13 it the same thing?

14 A. Yes.

15 Q. Do you ever perform any services for -- strike
16 that.

17 In your capacity at Dataway, do you ever
18 perform services for any outside clients?

19 A. (No response.)

20 Q. If you don't understand my question, I'll
21 rephrase it.

22 A. Yes, please.

23 Q. Sure.

24 Lawyers have clients, and they work for
25 clients.

1 A. Uh-huh.

2 Q. And some people in the office, though, don't
3 do anything for those outside clients. Some of them
4 answer the phone.

5 A. Uh-huh.

6 Q. Do you understand what I'm saying?

7 A. Yes.

8 Q. Do you ever perform any services for outside
9 clients?

10 A. No.

11 Q. All right. So, everything -- strike that.

12 Is that true from the period of July 24th of
13 2006 all the way through until today?

14 A. Yes.

15 Q. Back in '06, what was the nature of the
16 business activity of Dataway? What did it do?

17 A. Dataway is a company that provides managed
18 support and security for Internet and network (sic).

19 Q. Does that include telephone systems?

20 A. No.

21 Q. Just Internet?

22 A. Internet and network connections.

23 Q. How long -- is that its primary business
24 today?

25 A. Yes.

1 Q. How long has it been doing that?

2 A. Since its inception in 1996.

3 Q. Back in 2006, when Mr. Lewis was absent from
4 the company's headquarters, who was in charge?

5 A. The company is owned by two partners.

6 Usually if one is away, the other one is in
7 the office.

8 Simon takes care more of the financial and
9 business side of the operation, while the other partner,
10 Eoghan, is more involved in the technical/engineering
11 aspect.

12 Q. What is Eoghan's last name?

13 A. O'Neill, O-apostrophe-N-e-i-l-l.

14 And Eoghan is E-o-g-h-a-n. That's his first
15 name.

16 Q. I have never seen that spelling before. It's
17 very unusual.

18 MS. MATLOCK: It's nice to hear that answer.
19 I had the same response.

20 MR. AIRES: Q. All right. Did Mr. O'Neill
21 participate in any way in any of this AT&T toll-fraud-
22 resolution stuff?

23 A. No.

24 Q. All right. Now, it's been suggested in
25 responses to interrogatories that your time -- don't

1 take this the wrong way -- is worth \$50 an hour.

2 A. Yes.

3 Q. Do you know how that sum was determined?

4 A. Yes.

5 Q. How?

6 A. I took my salary, my annual salary, and
7 divided it by 2,088.

8 Q. And that's the average amount of hours in a
9 year?

10 A. Yes.

11 Q. Is that based on a 40-hour week?

12 A. Yes.

13 Q. Did you take into account any vacation you
14 might have taken?

15 A. No.

16 Q. All right. So, it's 52 weeks multiplied by
17 40, and then you took your salary and divided it?

18 A. Uh-huh.

19 Q. That's a "yes"?

20 A. Yes, which is the standard way of calculating
21 hourly rates.

22 Q. Sure. Did you do the same thing with respect
23 to Mr. Lewis?

24 A. Yes.

25 Q. You took his salary and divided it by 2,088?

1 A. No. I am sorry. I stand corrected.

2 Q. How did you figure out the 250 bucks an hour?

3 A. That's the rate we charge clients for
4 Mr. Lewis' consulting.

5 Q. And has that been consistently \$250 an hour
6 since July 24th of 2006?

7 A. Yes.

8 Q. He hasn't adjusted it upward for inflation or
9 anything?

10 A. Not yet. We are in the process of revising
11 those rates.

12 Q. Okay. Now, in the responses to
13 interrogatories, you've identified a category of damages
14 which is -- which -- withdrawn.

15 In the responses to interrogatories, you've
16 identified \$40,000 business interruption as an item of
17 damages.

18 Did you investigate whether or not there had
19 been any business interruption as a result of this
20 situation?

21 A. No. It was an assumption.

22 Q. And do you have a recollection of verifying,
23 under penalty of perjury, the responses to
24 interrogatories?

25 A. Say that again, please.

1 Q. All right. Anybody else?

2 A. We had a conference -- telephone conference
3 call with some gentleman with Crystal, Jessica. It was
4 a gentleman, but I don't recall his name or what
5 department within AT&T he was from.

6 Q. All right. In any of those communications,
7 did anybody at AT&T tell you that they were going to
8 waive the \$11,534.67?

9 A. Crystal and Jessica never said that because
10 they explicitly told me they couldn't be involved in the
11 dispute of that amount, given that that account, dealing
12 for (sic) -- within their system, whatever that meant,
13 and that we had to deal directly with the -- with AT&T
14 Corporate in -- and the Fraud Resolution Group regarding
15 this.

16 Daniela never said she would waive the charges.

17 She just asked us to fill out a form. And she
18 said it would go into investigation, and a resolution
19 would be made.

20 Q. Did Mr. Lewis ever tell you that he was told
21 by anybody at AT&T that AT&T would waive the \$11,534.67?

22 A. He was told by the lady technician from the
23 AT&T Technical Team in New Jersey that he talked to.

24 Q. He was told what by who?

25 A. That this was a common occurrence, and that

1 the process was to dispute the charges, and they will be
2 waived.

3 Q. Did they ever get waived?

4 A. Not the 11,000. They are still an open
5 balance.

6 Q. Okay. Did he ever indicate to you who he
7 spoke with?

8 A. He doesn't have a name for the person. All
9 he recalls -- he told me it was a woman from the AT&T
10 Technical Team in New Jersey.

11 Q. Did he ever tell you that he received within
12 ten days of that conversation any written evidence that
13 the charges in the amount of \$11,534.67 would be waived?

14 A. No.

15 Q. Okay. Did you ever figure out how your system
16 was compromised?

17 A. No. Me personally, no.

18 Q. Do you know if anybody at Dataway determined
19 how the Dataway system had been compromised?

20 A. Not to my knowledge.

21 Q. And the system that was in place in July of
22 2006, that was a system that was owned and operated by
23 Dataway?

24 A. Yes.

25 Q. I mean, you didn't lease your telephone system